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April 13, 2016

Southern Shores Board of Adjustments
Attn: Shelia Kane, Town Clerk
5375 N. Virginia Dare trail
Southern Shores, NC 27949

Re: Formal Zoning Ordinance Interpretation, dated March 14, 2016, by Wes Haskett,
Town Planner/Code Enforcement Officer
Subject Property: Tax Office Parcel # 031203000; PIN # 986712950388

MOTION TO STAY AND NOTICE OF APPEAL

Dear Ms. Kane:

In accordance with the provisions of Town Code Section 36-366(b), please treat this letter as a formal Motion to Stay and Notice of Appeal as to the Formal Zoning Ordinance Interpretation described above regarding the above referenced property.

In support thereof, the undersigned offers the following facts and information:

1. The particular property which is the subject of this motion/appeal:

Street Address: 0 Ocean Boulevard

Tax Parcel Identification Number: 031203000*

PIN Number: 986712950388*

Name/ Address of Property Owner per most recent tax listing abstract:

Boddie-Noell Enterprises, Inc.
P.O. Box 229
Kitty Hawk, NC 27949

***NOTE:** This (the subject) property is hereinafter referred to as the "Property".

2. The names and address of persons making the Motion and appealing this decision:

Property Owner #1: Gordon P. Stone, Jr. and Kay S. Stone**
P.O. Box 16155
Chesapeake, Virginia 23328

Property Owner #2: James L. Giordano and Janice L. Giordano**
6212 Greenwich Drive
Glen Allen, Virginia 23060

****NOTE:** Property Owner #1 and Property Owner #2 are hereinafter collectively referred to as the "Plaintiffs" or "Property Owners" being one and same party.

MOTION TO STAY

In response to an application submitted to the Town of Southern Shores by Gery Berryman requesting a permit to construct improvements on the Property, the undersigned, on behalf of the Property Owners, advised the Town (by letter dated August 14, 2015) that they objected to the issuance, on the grounds that the Property is neither a "lot" nor a "lot of record" within the meaning of Town Code Section 36-57. In support thereof, the Town was advised that:

- a. The Property has historically been used as a means of access;

- b. The Property has never been designated as a lot (having never been assigned a lot number) on any subdivision plat of record in Dare County, nor does it have a street address;
- c. The Property has never been described as a lot (a "closing" or enclosed parcel) of record, by metes and bounds or otherwise;
- d. The Property has been shown and described on numerous surveys over the years (including fairly recent ones) as "25th Street", and
- e. The Property has continuously been depicted and shown as a street on the Dare County Tax Maps, and, as a result, has been exempt from ad valorem taxes from the date of its original platting until 2013.

In addition to notifying the Town of their objections, Property Owners recognized that a determination of whether the Property is a "lot" or a "lot of record" under the Town zoning ordinance involves quasi-judicial decisions which exceed the Town's jurisdiction (*see*: N.C. Gen. Stat. Sec 160A-393). As a result, they elected to file a civil action (**PRIOR** to the issuance of the Town's decision) in the General Court of Justice, Superior Court Division, in Dare County, requesting that the court make judicial findings of fact and conclusions of law, the determination of which Property Owners believe are necessary to, and, anticipate will ultimately, resolve the issues being appealed herein. A copy of the Complaint initiating that action, duly filed on March 3, 2016 in Dare County Superior Court File No. 16-CVS-117, together with a copy of a Notice of Lis Pendens duly

filed on March 14, 2016, are attached hereto and incorporated herein by reference. The Complaint alleges, inter alia, that:

- a. N.C. Gen Stat. Sec. 136-96 (the statute relied upon by the then-developer, Kitty Hawk Land Company, Inc. (said developer being hereinafter referred to as "KHLIC") for authority to withdraw the Property from dedication as a street) has no application to, and thus did not authorize, the withdrawal of the Property from dedication for street or highway purposes, where, as in the subject case, (i) Property Owners' lots were sold and conveyed by reference to plats which dedicated 25th Street for street purposes, (ii) neither the Property Owners nor their predecessors in title consented to the withdrawal and (iii) as a matter of law, the continued right to use the Property is necessary to afford convenient ingress and egress to the abutting Property Owners.
- b. Because the Property was never validly or legally withdrawn from dedication, Property Owners contend that they are the owners of easement and appurtenant rights therein and have the right to have said Property kept open and free of obstruction for their use.
- c. To deprive Property Owners and those claiming by, through or under them, of easement and appurtenant rights in and to the Property, for the purpose of vesting such rights in another merely for private use, runs counter to the provisions of Article I of the Constitution of North Carolina and to the 14th Amendment to the Constitution of the United States.

Because a determination of these legal and constitutional issues is a necessary precondition to any final decision by the Town as to the Property's proper use(s) and purpose, Property Owner's contend that their appeal (as noted below) should be held in abeyance pending a final resolution of Property Owner's civil action.

Accordingly, for good cause shown and in the interest of judicial economy, Property Owners respectively move and request that any and all hearings on the merits of Property Owner's appeal (as noted below) be stayed by the Town of Southern Shores until such time as a final judgment is entered in Property Owners civil action initiated by the filing of the Complaint (a copy of which is attached hereto), currently pending in File No. 16-CVS-117 in the Office of the Superior Court in Dare County, North Carolina.

NOTICE OF APPEAL

In conjunction with this Motion, and for the purpose of both noting and preserving their objections to the Town's Formal Zoning Ordinance Interpretation date March 14, 2016, Property Owners do further appeal said determination, as follows:

1. The specific provisions or portions of the Town's decision being appealed.

Property Owners respectively appeal the following:

- a. The finding that a Declaration of Revocation dated March 18, 1974 and recorded in Book 210, Page 91, Dare County Public Registry, by KHLC, legally and validly withdrew from dedication all portions of 25th Street, as shown on various maps or plats which KHLC caused to be recorded, to include, but not be limited to, those certain maps or plats recorded in Map

Book 1, Page 124, and in Map Book 1, Page 139, all in the Dare County Public Registry.

- b. The finding that the Property is a "lot" within the meaning of Town Code Section 36-57.
- c. The finding that the Property is a "lot of record" within the meaning of Town Code Section 36-57.
- d. The finding that the Property is nonconforming and was a lot of record existing before the effective date of the adoption of the zoning ordinance by the Town when the Town was incorporated in 1979, within the meaning of Town Code Section 36-132(a).

2. **Grounds for Appeal:** Property Owner #1 owns property contiguous to, and adjoining, the Property to the south. Property Owner #2 owns property contiguous to, and adjoining, the Property to the north. By virtue thereof, Property Owners contend that:

- a. For reasons as set forth above, N.C. Gen Stat. Sec. 136-96 has no application to, and thus did not authorize, the withdrawal of the Property from dedication for street or highway purposes.
- b. Because the Property was never validly or legally withdrawn from dedication, Property Owners are the owners of easement and appurtenant rights therein and have the right to have said Property kept open and free of obstruction for their use.

- c. The Property is not a "lot" within the meaning of Town Code Section 36-57 for the reason that it was never occupied or intended to be occupied by a building or any related improvements. Instead, the Property was (and is) a portion of a dedicated street and cannot be withdrawn as such.
- d. The Property is not a "lot of record" within the meaning of Town Code Section 36-57 for the reason that it has never been designated as a lot on any subdivision plat(s) of record in Dare County, nor has it ever been described as a lot of record, by metes and bounds or otherwise.
- e. For reasons as stated, the Property was not a lot of record existing before the effective date of the adoption of the zoning ordinance by the Town when the Town was incorporated in 1979, within the meaning of Town Code Section 36-132(a).
- f. And, to deprive Property Owners and those claiming by, through or under them, of easement and appurtenant rights in and to the Property, for the purpose of vesting such rights in another merely for private use, runs counter to the provisions of Article I of the Constitution of North Carolina and to the 14th Amendment to the Constitution of the United States.

3. Names and addresses of all persons entitled to receive notice pursuant to Town Code Section 36-362 (b):

- a. Persons appealing the Town's decision:

i. Abutting property owners to the north:

James L. Giordano and Janice L. Giordano
6212 Greenwich Drive
Glen Allen, Virginia 23060

ii. Abutting property owners to the south:

Gordon P. Stone, Jr. and Kay S. Stone
P.O. Box 16155
Chesapeake, Virginia 23328

b. Owner of the Property that is the subject of this appeal:

Boddie-Noell Enterprises, Inc.
P.O. Box 229
Kitty Hawk, NC 27949

Attorneys for Boddie-Noell Enterprises, Inc.:

Wyatt M. Booth
Williams Mullen
P.O. Box 1000
Raleigh, NC 27602

c. Abutting property owner to the west:

Chicahauk Property Owners Association, Inc.
5377 N. Virginia Dare Trail
Southern Shores, NC 27949

Attorney for Chicahauk Property Owners Association, Inc.:

E. Crouse Gray, Jr.
Gray & Lloyd, LLP
3120 N. Croatan Hwy., Suite 101
Kill Devil Hills, NC 27948

d. Attorney for Grey Berryman and Forrest Seal:

Starkey Sharp
Sharp, Michael, Graham & Baker, LLP
P.O. Drawer 1027
Kitty Hawk, NC 27949

e. Town of Southern Shores:

Wes Haskett, Town Planner/Code Enforcement Officer
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

Peter Rascoe, Town Manager
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

Benjamin M. Gallop, Town Attorney
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

6. Attachments:

- a. Complaint for Declaratory Judgment, filed on March 3, 2016, in the General Court of Justice, Superior Court Division, in Dare County File No: 16-CVS-117, and which consists of 6 pages.
- b. Notice of Lis Pendens, file on March 14, 2016, also in File No: 16-CVS-117, and which consists of 2 pages.

Sincerely,

A handwritten signature in black ink, appearing to read 'Charlie Aycock', with a large, stylized loop at the end.

Charlie Aycock,
Attorney for Movants/ Appellants

Enclosures

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing together with the attachments hereto have been served upon the following by USPS or hand-delivery as noted.

HAND DELIVERY:

Southern Shores Board of Adjustments
Attn: Shelia Kane, Town Clerk
Town of Southern Shores
5375 N. Virginia Dare trail
Southern Shores, NC 27949

Wes Haskett, Town Planner/Code Enforcement Office
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

Peter Rascoe, Town Manager
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

Benjamin M. Gallop, Town Attorney
Town of Southern Shores
5375 N. Virginia Dare Trail
Southern Shores, NC 27949

USPS:

Boddie-Noell Enterprises, Inc.
c/o Wyatt M. Booth
Williams Mullen
P.O. Box 1000
Raleigh, NC 27602

Chicahauk Property Owners Association, Inc.
c/o E. Crouse Gray, Jr.

Gray & Lloyd, LLP
3120 N. Croatan Hwy., Suite 101
Kill Devil Hills, NC 27948

Grey Berryman & Forrest Seal
c/o Starkey Sharp
PO Drawer 1027
Kitty Hawk, N.C. 27959

This the 13th day of April, 2016

A handwritten signature in black ink, appearing to read 'Charlie Aycock', with a long horizontal flourish extending to the right.

Charlie Aycock

THE PROPERTIES

5. By this action, Plaintiffs are requesting the Court to declare the rights and interests of the parties in and to a certain parcel of land described as:

Being that parcel known as Parcel # 031203-000 and Dare County PIN # 986712950388 bounded on the east by the west margin of the right of way of Ocean Blvd. (NC-12); on the west by property owned by the Chicahauk Property Owners Association, Inc.; bounded on the north by property known as Lot No. 1-2, Block 15, Section 1, Southern Shores (Parcel # 022661-000, PIN # 986712950455) and on the south by property known as Lot 11-12, Block 14, Section 1, Southern Shores (Parcel # 022660-000, PIN # 986712951312).

For a further reference see the plat attached hereto as Exhibit "A" entitled "25TH STREET PARCEL, SOUTHERN SHORES" dated January 8, 2016 and drawn by Quible and Associates, P.C., said plat being incorporated by reference.

Said parcel of land shall hereinafter be referenced as the "25th Street Parcel".

6. Plaintiffs Giordano own the property contiguous to, and adjoining, the 25th Street Parcel to the north, having acquired title thereto on or about August 17, 1978 by Deed recorded in Deed Book 266, Page 327, in the Public Registry in Dare County, North Carolina (said deed being incorporated herein by reference). Giordano's property is described as:

Lots 1 and 2, Block 15, Section 1. as shown on that certain map or plat entitled "Southern Shores", recorded in Map Book 1, Page 124, Public Registry of Dare County, North Carolina.

Said property shall hereinafter be referred to as the "Giordano Parcel".

7. Plaintiffs Stone own the property contiguous to, and adjoining, the 25th Street Parcel to the south, having acquired title to their property on or about July 31, 2014 by Deed recorded in Deed Book 1968, Page 608. in the Public Registry in Dare County, North Carolina (said deed being incorporated herein by reference). Stone's property is described as:

Lots No. 11 & 12, Block 14, Section 1 of the subdivision known as Southern Shores, as shown and delineated on a map or plat thereof entitled "Amended Plat, Section 1, Southern Shores," made by D. H. Lawrence, Surveyor, and duly recorded in Map Book 1, Page 124, in the Office of the Register of Deeds of Dare County, North Carolina.

Said property shall hereinafter be referred to as the "Stone Parcel".

8. On information and belief, Defendant claims title to the 25th Street Parcel, free and clear of any easement and/or appurtenant rights in and to the Plaintiffs, by virtue of that certain Non-Warranty Deed recorded on March 26, 2015 in Deed Book 2010, Page 85 in the Public Registry in Dare County, North Carolina.

9. Plaintiffs' properties are improved, with residential dwellings constructed thereon. The 25th Street Parcel is, at present, vacant.

CONTROVERSY

10. At the time of their respective purchases and at all times relevant hereto, Plaintiffs were informed, and believed, that the 25th Street Parcel was dedicated for the purpose of providing convenient ingress and egress for the benefit of Plaintiffs' properties and would at all times remain open and unimproved for said purpose.
11. On information and belief, Defendant has petitioned the Town of Southern Shores, North Carolina for a determination that the 25th Street Parcel is a "grandfathered" lot under the Town's current Zoning Ordinance and suitable for construction of a residential dwelling thereon, which determination and use would interfere with Plaintiffs' rights and obstruct Plaintiffs' use of the 25th Street Parcel.

BACKGROUND

12. Kitty Hawk Land Company, Inc. (hereinafter referred to as "KHLC") and its predecessors, in the course of their development of a subdivision known as "Southern Shores Subdivision" located in Kitty Hawk, North Carolina, did cause numerous maps or plats to be prepared and recorded in the Public Registry in Dare County, North Carolina, to include, but not be limited to, that certain map or plat entitled "Section One, Southern Shores, Kitty Hawk, N.C.", recorded in Map Book 1, Page 139, and that certain map or plat entitled "Amended Plat, Section One, Southern Shores, Kitty Hawk, N.C.", recorded in Map Book 1, page 124. Said maps or plats, which depict various lots and streets in the subdivision, are incorporated herein by reference as if fully set out (and shall hereinafter be referred to as the "Southern Shores Plat").
13. The 25th Street Parcel is shown on the Southern Shores Plat as a portion of a "paper" street known as 25th Street.
14. The Giordano Parcel and the Stone Parcel were sold and conveyed by KHLC by reference to the Southern Shores Plats and all other documents related thereto.
15. Subsequently, on or about March 18, 1974, KHLC, did cause to be filed, pursuant to N.C. Gen. Stat. § 136-96, a Declaration of Withdrawal, recorded in Deed Book 210, page 91, in the Public Registry in Dare County, North Carolina (said document being incorporated herein by reference, and hereinafter referred to as the "Declaration"), which Declaration purported to withdraw from dedication various streets and properties shown on the Southern Shores Plat, to include, but not be limited to, the 25th Street Parcel, for the purpose of pursuing "an alternative development and street location plan".
16. As evidenced by the public records in Dare County, neither the Plaintiffs nor any of their predecessors in title consented to the withdrawal from dedication of the 25th Street Parcel.

17. The continued right to use the 25th Street Parcel is necessary to afford convenient ingress and egress to Plaintiffs' properties, as a matter of law.
18. The 25th Street Parcel has (i) remained unimproved and vacant since its original platting, (ii) was never described, deeded or platted as a lot of record prior to 2013, (iii) has been described on various surveys prepared for the Plaintiffs and/or others, from and after the purported withdrawal date, as "25th Street", and (iv) being shown as a street on the Dare County Tax Maps, was exempt from ad valorem taxes from the date of its original platting until 2013.
19. Upon information and belief, on or about 2013, Robin Etheridge, an employee in the Dare County Tax Office, noted that no taxes had been paid on the 25th Street Parcel since the filing of the Southern Shores Plat. Ms. Etheridge concluded (based upon her subsequent review of the Declaration) that the 25th Street Parcel was owned by KHLC and/or its successors in interest and listed the 25th Street Parcel as a vacant lot for ad valorem tax purposes. Tax bills were issued. Thereafter, Defendant caused a deed to be recorded in its favor, describing the 25th Street Parcel, and later undertook to obtain approval for the parcel's development, as hereinabove described.

CLAIM(S) FOR RELIEF

20. A genuine controversy exists in that the Defendant, on information and belief, claims fee title to the 25th Street Parcel, free and clear of any easement and appurtenant rights in favor of the Plaintiffs. Plaintiffs dispute this claim and, thus, seek a determination that they are the owners of easement and appurtenant rights in and to the 25th Street Parcel, and, by virtue thereof, have the right to have said parcel kept open and free of obstruction for their use. In support thereof, Plaintiffs show the Court that:
 - a. When KHLC sold the Giordano Parcel and the Stone Parcel by reference to the Southern Shores Plat and all related documents, the owners of said parcels acquired the appurtenant right to use the 25th Street Parcel and to have it kept open and freed of obstruction for their use;
 - b. The provisions of N.C. Gen. Stat. §§ 136-96 have no application to, and thus did not authorize, the withdrawal of the 25th Street Parcel from dedication for street or highway purposes, for the reason that (i) neither the Plaintiffs nor any of their predecessors in title consented to the withdrawal and (ii) the continued right to use said strip or parcel of land is necessary to afford convenient ingress and egress to Plaintiffs' properties, as a matter of law;
 - c. Plaintiffs are the owners of easement and appurtenant rights in and to the 25th Street Parcel and are entitled to have the 25th Street Parcel kept open and free from any obstructions; and

- d. To deprive Plaintiffs and those claiming by, through or under them, of easement and appurtenant rights in and to the 25th Street Parcel, for the purpose of vesting such rights in another merely for private use, would run counter to the provisions of Article 1 of the Constitution of North Carolina and to the 14th Amendment of the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the court to determine:

1. The rights and interests of the parties, per its inherent power to do so;
2. That the 25th Street Parcel was never withdrawn from dedication for street or highway purposes;
3. That the continued right to use the 25th Street Parcel is necessary to afford convenient ingress and egress to Plaintiffs' properties, as a matter of law;
4. That Plaintiffs, by virtue of their respective property ownerships, are the owners of easements and appurtenant rights in and to the 25th Street Parcel; and
5. That the 25th Street Parcel must remain open and free from any obstructions for the purpose of providing Plaintiffs, and those claiming by through or under them, with all rights as argued above.

This the 2nd day of March, 2016.

COUNSEL FOR PLAINTIFFS:



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State Bar # 7589
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NORTH CAROLINA
DARE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 16-CVS-117

GORDON P. STONE, JR. and wife,
KAY S. STONE; and, JAMES L.
GIORDANO and wife, JANICE L.
GIORDANO,

Plaintiffs

vs.

BODDIE-NOELL ENTERPRISES, INC.,
Defendant

NOTICE OF LIS PENDENS

AP
COPY

This Notice of Lis Pendens, filed with the Clerk of Superior Court of Dare County, North Carolina, shows:

I

That a civil action was filed on March 3, 2016 in the Superior Court of Dare County, North Carolina in which Gordon P. Stone, Jr. and wife Kay S. Stone, and James L. Giordano and wife Janice L. Giordano are the Plaintiffs and Boddie-Noell Enterprises, Inc. is the Defendant.

II

That said action involves a dispute regarding title to real property as described below.

III

That the real property which is the subject of this Lis Pendens lies in the Town of Southern Shores, Dare County, State of North Carolina, and is more particularly described as follows:

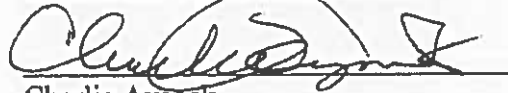
Being that parcel known as Parcel # 031203-000 and Dare County PIN # 986712950388 bounded on the east by the west margin of the right of way of Ocean Blvd. (NC-12); on the west by property owned by the Chicahawk Property Owners Association, Inc.; bounded on the north by property known as Lot No. 1-2, Block 15, Section 1, Southern

Shores (Parcel # 022661-000, PIN # 986712950455) and on the south by property known as Lot 11-12, Block 14, Section 1, Southern Shores (Parcel # 022660-000, PIN # 986712951312).

This Notice of Lis Pendens is filed under the provisions of Section 1-116 of the General Statutes of North Carolina, and all persons will take notice of the same.

This the 16th day of March, 2016.

COUNSEL FOR PLAINTIFFS:

A handwritten signature in black ink, appearing to read 'Charlie Aycock', is written over a horizontal line.

Charlie Aycock

PO Box 117

Nags Head, N.C. 27959

State Bar # 7589

(252) 441-2071

aycock@outerbanksattorneys.com